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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1966

No. 261

STEVEN L. RUSKIN, Petitioner

-vs-

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR REHEARING

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Miami, Florida 33132

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PETITION FOR REHEARING

The Petitioner, STEVEN L. RUSKIN, herewith files his Petition for Rehearing from the Order of this Court filed October 10, 1966, which denied Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit with relation to the judgment of said Court entered March 18, 1966 (R 642) and reported at 358 F.2d 737. This Petition is filed in accordance with 28 U.S.C. Supreme Court Rule 58; more specifically, Petitioner submits that there are substantial grounds which were available to him which he has not previously presented, in addition to which case rulings

have been filed subsequent to the time Petitioner presented his original petition to this Court.

It is respectfully submitted that this Court, in connection with its refusal to grant Petitioner a Writ of Certiorari, has apparently overlooked, in addition to the points set forth in the original Petition for a Writ of Certiorari based upon UNITED STATES vs. MAYBURY (C.A. 2d 1960) 274 F2d 899, the law as set out in UNITED STATES vs. CIANCHETTI (C.A. 2d 1963) 315 F2d 584, in PHILLIP vs. UNITED STATES (C.A. 9th, 1966) 356 F2d 297, and by this Court in INGRAM vs. UNITED STATES (1959) 360 U.S. 679, 79 S.Ct. 1314.

Respondent in its Brief in Opposition to the Petition for a Writ of Certiorari, in its Statement of the Facts seeks to set forth evidentiary material upon which it believes the trial judge based his conviction of Petitioner of conspiracy as set forth in the indictment (R1). For the sake of argument even if the Petitioner knew of or participated in the acts set forth in Respondent's Statement (Res. Br. 2-5), the Petitioner would still not be guilty of conspiracy in violation of 18 U.S.C. 371. At the trial, the prosecution failed to show any fixed agreement on the part of the Petitioner to participate in the venture. The Court in UNITED STATES vs. CIANCHETTI, Supra, said:

> "But knowledge of the existence and goals of a conspiracy does not of itself make one a co-conspirator. There must be something more than mere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy . . . CLEAVER vs. UNITED STATES 238 F2d 766, 771 (10th CIR. 1956). This "something more" is

> generally described as a "stake in the venture". In prosecutions for conspiracy . . . (the defendants) attitude towards the forbidden undertaking must be positive . . . he must in some sense promote their venture himself, make it his own, have a stake in its outcome". UNITED STATES vs. FALCONE 109 F2d 579, 581 (2d CIR.) AFF'D 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed 128 (1940)."

The evidence presented before the trial court failed in every instance to establish beyond every hypothesis of innocence that the Petitioner had a personal knowledge of the false or fraudulent manner in which his Co-Defendant, McKee, operated or managed the business of Industrial or Commercial. BECKERMAN vs. UNITED STATES 96 F2d 15. Further, from the evidence presented to the trial court, there was an affirmative lack of direct testimony that Petitioner had personal knowledge that the business, in which his co-defendant McKee was engaged in, was being operated in a deceitful manner. Constructive or circumstantial knowledge of this deceit is insufficient to prove criminal intent, a necessary element to the crime of conspiracy. See PHILLIPS vs. UNITED STATES (C.A. 9th 1966) 356 F2d 297, 303.

It is affirmatively submitted that Petitioner, an attorney representing a client, had no stake in the business of Industrial or Commercial, nor did he do anything to make the venture his own. If this Court allows the conviction against this Petitioner to stand affirmed, then, arguendo, any attorney representing a client, drawing legal documents or giving advice to a client, is in jeopardy of being convicted of conspiracy, if the client runs afoul

of the law based, wholly or partially, upon legal documents or advice given to the client by the attorney. This would include organizing a corporation for a client, examining an abstract of title, preparing deeds, mortgages, etc.

In addition to UNITED STATES vs. CIANCHETTI, Supra, it is submitted that this Court may have overlooked the fact that it has previously said,

> "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."
>
> INGRAM v. UNITED STATES,
> (1959) 360 U.S. 679; 79 S.Ct. 1314, 1319

In the instant case, the trial court, by acquitting Petitioner of the substantive charges, apparently failed to find any criminal intent on the part of the Petitioner, thus negating and contradicting itself by finding Petitioner guilty of conspiracy, yet at the same time the trial court found the co-conspirator, McKee, guilty of conspiracy and of the substantive counts. Innocent participation is not actionable and no criminal intent having been found to exist, the necessary quality of intent as to the conspiracy is non-existent. PEOPLE v. POWELL, 63 N.Y. 88.

It must therefore be submitted that the rule of law set forth in UNITED STATES vs. MAYBURY (C.A. 2d 1960) 274 F2d 899, should govern the instant case as all counts of the original indictment (R1) are based upon the

same facts and therefore acquittal on the substantive counts and conviction of Petitioner of conspiracy is wholly inconsistent, especially when co-defendant McKee was convicted on conspiracy and the substantive counts. The result is wholly irreconcilable with any rational theory, as on one hand it is adjudicated that there was no criminal intent and on the other hand that there was such an intent, and therefore the judgments of the trial court can only be explained on the basis of compromise.

If the law is settled, as it apparently is, that the overt acts of one co-conspirator are adopted by and are the acts of another co-conspirator, it is difficult to rationalize the acquittal of this Petitioner of the substantive counts of the indictment yet, on the very same facts and evidence, the conviction of the co-conspirator McKee on the same substantive counts, keeping in mind that the trial court found both Petitioner and the co-conspirator McKee guilty of the conspiracy count. This conflict falls squarely within the MAYBURY rule.

The government's brief admits that the trial court committed error, in that it could have found Petitioner guilty of the substantive counts. Petitioner submits that if error was present in the decision of the trial court, it should be resolved in his favor, as if he was found not guilty of the substantive counts, he should benefit from the evidence decided in his favor as to those counts of the indictment; that in applying the same evidence, which the trial court did, to the conspiracy count, Petitioner should have been acquitted of conspiracy. The evidence relating to the common element of both the substantive counts and the conspiracy count of the indictment, to wit, criminal intent, was based on the same facts. Of neces-

sity, then, the trial court in convicting the Petitioner of conspiracy, believed and relied on the very same evidence it chose not to believe when it acquitted Petitioner of the substantive counts, thus raising a true conflict as described in the MAYBURY case. The judgment of the trial court was wholly irreconcilable with any rational theory and the trial court's ruling can only be explained on the basis of compromise.

CONCLUSION

It is submitted that the point submitted to this Court in the instant case is of great importance; that it has great bearing upon the function of a trial judge sitting without a jury; that there appears to be no uniformity between circuits as to the limits of discretion to be exercised by a trial judge, sitting without a jury, in a criminal case. Uniformity in such an instance, between circuits should be achieved regardless of whether or not the decision of a lower court is clearly erroneous.

Petitioner respectfully submits therefore, that he be granted a rehearing upon his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the grounds heretofore set forth which affirmatively show that Petitioner, having been acquitted on all substantive counts of the indictment by a trial judge sitting without a jury, should necessarily have had all of the evidence which was decided in his favor by the acquittal, to wit: criminal intent, also decided in his favor thereby resulting in his acquittal of the conspiracy count. The contradictory ruling by the trial court and the appellate court in the instant case, affirming the guilt of the

Petitioner lies squarely within the rule of UNITED STATES vs. MAYBURY, Supra.

Respectfully submitted,

J. EDWARD WORTON
Attorney for
STEVEN L. RUSKIN, Petitioner
525 Pan American Bank Building
Miami, Florida 33132

CERTIFICATE

I HEREBY CERTIFY that this Petition was not presented for delay and was filed in good faith; that this Petition is restricted to matters which were available to Petitioner and not previously presented and also on decisions which were filed subsequent to the time Petitioner filed his original Petition.

J. EDWARD WORTON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the required copies of the foregoing Petition for Rehearing were mailed to the Clerk of the United States Supreme Court; to the Honorable William A. Meadows, United States Attorney for the Southern District of Florida, United States Courthouse, Miami, Florida; to the Solicitor General, Department of Justice, Washington, 25, D. C., this 22d day of Nov., 1966.

J. EDWARD WORTON